Petition

Office-Supreme Court, U.S.
FILED
JUL 22 1981
ALEXANDER L. STEVAS,
CLERK

81-315

No. 81

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL NO. 89, AFL-CIO,

Petitioner,

VS.

EDUARDO PIDERMANN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ~~TENTH~~ 9th CIRCUIT

PETITION FOR WRIT OF CERTIORARI

THOMAS B. MANNING
KERRY M. DONNELL, of the Firm
LAW OFFICES OF THOMAS B. MANNING
2232 El Cajon Boulevard
San Diego, California 92104
Tel.: (714) 293-7560

Counsel of Record for Petitioner

PANDICK PRESS, WEST COAST, 1945 S. FIGUEROA, LOS ANGELES, CALIFORNIA (213) 747-4321

QUESTION PRESENTED

Does the judgment of the court below conflict with the decisions of this Court where on the evidence of record the court below affirmed the judgment of the trial court finding that an employee can recover damages for loss of employment from his union for its failure to properly represent him in the handling of a grievance for an alleged wrongful discharge notwithstanding the fact that the trial court found that the employee had been discharged for legally sufficient cause in accordance with the applicable collective bargaining agreement?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REQUIRING AN APPORTIONMENT OF DAMAGES IN FAIR REPRESENTATION CASES. 3

This Court has consistently held that in fair representation cases damages must be allocated between the union and the employer in accordance with the damage caused by the fault of each. 3

CONCLUSION 7

APPENDIX A:

Ninth Circuit of Appeals Memorandum A-1

TABLE OF AUTHORITIES

CASES	PAGE
Czosek v. O'Mara, 397 U.S. 25 (1970)	4, 6, 7
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976)	4, 7
International Brotherhood of Electrical Workers v. Leroy Foust, 442 U.S. 42 (1979)	5, 7
United Parcel Service, Inc. v. William Mitchell, ____ U.S. ____ (1981)	4, 7
Vaca v. Sipes, 386 U.S. 171 (1967)	3

No. 81

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL NO. 89, AFL-CIO,

Petitioner,

VS.

EDUARDO PIDERMANN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Laborers' International Union of North America, Local No. 89, AFL-CIO (Union), respectfully requests that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 20, 1981.

OPINIONS BELOW

The Opinion of the Court of Appeals appears in the Appendix hereto at A. 1-6. A Petition For Rehearing and Suggestion For Rehearing En Banc was denied on June 10, 1981. No written opinion was rendered by the District Court for the Southern District of California.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This is an action which the respondent (Pidermann), a former employee of Mission Valley Brick Company, Inc. (Company), brought suit against Laborers' International Union of North America, Local No. 89, AFL-CIO (Union) and the Company for breach of collective bargaining agreement, breach of duty of fair representation and wrongful discharge from employment.

In November, 1975, Pidermann was discharged by the Company for failing to follow instructions. Pidermann informed his Union about his discharge and requested help. Union representatives investigated his grievance and concluded that he had quit his job voluntarily and that he had not been fired.

The collective bargaining agreement between the Union and the Company, which covered Pidermann's employment, provided a grievance procedure whereby the Union could request an arbitration to resolve disputes concerning the agreement. The Union decided not to seek an arbitration of Pidermann's grievance that he had been discharged by the Company without just cause.

Pidermann filed a complaint against the Union and the Company seeking damages for the wages and fringe benefits he had lost as a result of his termination. The trial court in this case found that the Union had breached its duty of fair representation to Pidermann by arbitrarily concluding that he had quit his job and on the basis of that conclusion failing to seek his reinstatement by requesting arbitration. The trial court also found that there was no breach of the collective bargaining

agreement by the Company because it had just cause to discharge Pidermann for failure to follow instructions. The trial court entered judgment against the Union and awarded Pidermann $53,893.00 as compensatory damages for his loss of employment. The trial court did not find the Company liable for any of Pidermann's damages.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REQUIRING AN APPORTIONMENT OF DAMAGES IN FAIR REPRESENTATION CASES.

This Court has consistently held that in fair representation cases damages must be allocated between the union and the employer in accordance with the damage caused by the fault of each.

In *Vaca v. Sipes*, 386 U.S. 171 (1967) at 196-197 the Court first ennunciated this rule of apportionment when it said:

> ". . . what portion of the employee's damages may be charged to the union: in particular, may an award against a union include, as it did here, damages attributable solely to the employer's breach of contract? We think not. Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. . . . The governing principle then is to apportion liability between the employer and the union according to the damage caused by the fault of each."

In *Czosek v. O'Mara*, 397 U.S. 25 (1970) at 29 the Court conditioned the recovery of damages from a union for loss of employment when it said:

> "Assuming a wrongful discharge by the employer independent of any discriminatory conduct of the union and subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are recoverable except to the extent that its refusal to handle the grievance added to the difficulty and the expense of collecting from the employer. If both the union and the employer have independently caused damage to the employees, the union can not complain if separate actions are brought against it and the employer for the portion of the total damages caused by each."

In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) at 570, the Court said:

> "To prevail against either the company or the union petitioners [the employees] must show not only that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the union."

In *United Parcel Service, Inc. v. William Mitchell*, ____ U.S. ____ (April 20, 1981) Justice Stevens, concurring in part and dissenting in part with the majority opinion, recognized the Court's stance on the issue of apportionment when he said:

> "The claims [against the union for breach of the duty of fair representation and against the employer for breach of the collective bargaining agreement] are closely related because, to prevail against the employer, the employee must establish that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement; similarly, to prevail against the union, the employee must prove that the union breached its duty of fair representation and, if he wishes to recover loss of employment damages for which the union is

responsible, that the employer breached the agreement. However, despite this close relationship, the two claims are not inseperable. Indeed, although the employee in this case chose to sue both the employer and the union, he was not required to do so; he was free to institute suit against either one as the sole defendant." Footnote 2 at 49 LW 4382. "While an arbitration decision favorable to the employer—for example, that the discharge did not breach the collective bargaining agreement—would be of substantial significance in an employee's suit against his union, it would not necessarily be dispositive. The determination whether the employer breached the agreement may be highly relevant to the amount of damages caused by the union's alleged breach of duty, but it is not necessarily controlling with respect to the threshold question whether there was any breach of duty by the union at all. For example, if, solely for reasons of racial bias, a union processes a discharged employee's grievance in bad faith, the union breaches its duty of fair representation. . . . The fact that the underlying discharge may not have violated the collective bargaining agreement does not necessarily absolve the union of liability for its breach, although it may limit the size of the employee's recovery against the union. Thus, while a court considering an employee's claim against a union will evaluate the validity of the employer's underlying conduct, that evaluation is not central to the resolution of the duty of fair representation claim." Footnote 4 at 49 LW 4382.

In *International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42 (1979) at 49-50 the Court in not permitting an employee to recover punitive damages in a fair representation cause brought under the Railway Labor Act said:

"The Court in *Vaca* applied the compensation principle not only to gauge the sufficiency of relief but also to limit union liability. Because an employee can recover in full from his employer for its breach of contract, we reasoned

> that a union which fails to process a grievance predicated on that breach cannot be held liable for damages attributable to the employer's conduct . . . . Recognizing the 'real hardship' that large damage awards could impose on unions, the Court found 'no merit in requiring [them] to pay the employer's share of damages'. . . . To avoid burdening unions beyond the extent necessary to compensate for their injuries, we refused to create an exception even for those unions with indemnification rights against employers. . . . Although acknowledging that this apportionment rule might in some instances effectively immunize unions from liability for a clear breach of duty, the Court found considerations of deterrence insufficient to risk endangering the financial stability of such institutions. . . . Accordingly, we vacated the jury's award of compensatory and punitive damages against the union since 'all or almost all' of the employee's damages were attributable to the discharge. . . .
>
> This limitation on union liability thus reflects an attempt to afford individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited funds. To permit punitive damages, which, by definition, provide monetary relief 'in excess of . . . actual loss,' *Scott v. Donald,* 165 U.S. 58, 86 (1897), could undermine this careful accommodation."

In the instant case, the court below erred when it affirmed a decision which failed to allocate damages between the Union and the Company in accordance with the damage caused by the fault of each. The court below permitted the trial court to assess all of the damages against the Union. This was the very thing which concerned the petitioning unions in *Czosek, supra,* and of which this Court, at page 25 of that decision, said that such concerns were "groundless".

There was no conspiracy between the Union and the Company to deprive Pidermann of his job, therefore *Czosek* precludes the recovery of damages for loss of employment from the Union. Pidermann was unable to show, at trial, that his discharge was contrary to the collective bargaining agreement, therefore he failed to satisfy the requirements imposed by this Court in *Hines, supra,* relating to the assessment of damages in fair representation cases involving an alleged wrongful discharge. The fact that the underlying discharge of Pidermann did not violate the collective bargaining agreement apparently did not cause the court below to limit the size of the employee's recovery against the Union in the manner which Justice Stevens felt it should be as evidenced by his comments in *United Parcel Service, Inc., supra.* Finally, petitioners would submit that the award of damages in the instant case actually constitutes an award of punitive damages which is clearly prohibited by this Court's decision in *Foust, supra.* Such a conclusion is inescapable in light of the fact that there are no legitimate compensatory damages for loss of employment when the loss of employment was the result of a legal discharge effected by an employer in accordance with a collective bargaining agreement. The damages awarded were punitive because there was no rational basis for awarding compensatory damages for loss of employment.

CONCLUSION

The court below erred by affirming the trial court's judgment awarding Pidermann damages for his loss of employment solely against the Union. The appropriate measure of damages in this case would be the cost of prosecuting the claim of plaintiff (i.e., his court costs and attorneys fees). Such is the only reasonable interpretation in this matter.

There is no legal authority which supports the lower court's decision. This Court has held that the damages which can be recovered from the Union in fair representation cases. In the

instant case there was no apportionment of damages. The Union's misconduct prevented Pidermann from obtaining a hearing, via the arbitration clause of the collective bargaining agreement, on the issue of whether or not he had been discharged by the Company with just cause. The Union's misconduct did not cause Pidermann to lose his job and therefore, damages for loss of employment cannot be assessed against Union. Such a recovery certainly would not be compensatory since the trial court found that the Company had legally sufficient cause to discharge Pidermann. Therefore, such a recovery would appear to be punitive and, as such, contradicts the decision of this Court.

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the court below.

DATED: July 16, 1981

Respectfully submitted:

Thomas B. Manning

Kerry M. Donnell of the Firm
LAW OFFICES OF THOMAS B. MANNING
2232 El Cajon Boulevard
San Diego, California 92104
Tel: (714) 293-7560

Counsel of Record for Petitioners

APPENDIX

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FILED
APR 20, 1981
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

EDUARDO PIEDERMANN,
Plaintiff-Appellee,

vs.

MISSION VALLEY BRICK COMPANY, INC.,
Defendant,

and

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 89, AFL-CIO,
Defendant-Appellant.

No. CA 79-3620
No. DC 76-1085-S

EDUARDO PIEDERMANN,
Plaintiff—Cross-Appellant,

vs.

MISSION VALLEY BRICK COMPANY, INC.,
Defendant,

and

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 89, AFL-CIO,
Defendant—Cross-Appellee.

No. CA 79-3535

MEMORANDUM

Appeal from the United States District Court for the Southern District of California
Edward J. Schwartz, District Judge, Presiding
Argued and submitted January 8, 1981

Before: TRASK, SNEED, and SCHROEDER, Circuit Judges

Piedermann is a resident alien of the United States who speaks little English.[1] In late November, 1975, Piedermann was discharged by his employer, Mission Valley Brick Company, (Mission Valley) for failing to follow instructions. In early December, Piedermann informed his union, Laborers' International, Local 89 (the Union), of his discharge and requested that it take action to bring about his reinstatement. A union official, Alcoser, investigated the grievance. After questioning Mission Valley, but without talking to Piedermann, Alcoser concluded that Piedermann had not been fired, but had quit his job voluntarily. He recommended that the Union not pursue Piedermann's grievance. The Union accepted this recommendation, and Piedermann was informed of the decision in a meeting with another union official, Usiquiano.

Piedermann filed suit in the district court against Mission Valley and the Union, alleging, *inter alia*, that the Union had violated its duty of fair representation (DFR) by failing to pursue his grievance. After a trial on the merits, the district judge held that the Union breached the DFR that it owed to Piedermann because its investigation of the grievance was "so perfunctory as to make its decision not to pursue the grievance an abritrary one," and because the decision itself was discriminatory. The court awarded actual damages to Piedermann, but denied his prayer for future damages. We affirm.

I

It was held in *Vaca v. Sipes*, 386 U.S. 171 (1967), that a union breaches its DFR only when its conduct toward one of its members is arbitrary, discriminatory, or in bad faith. *Id.* at

[1] The district court found that Piedermann's English proficiency was insufficient to permit him effectively to pursue his grievance informally without aid from appellant Laborers' International Union, Local 89. An interpreter was required at the trial. However, it is apparent from the record that Piederman is able to speak some English. See note 3 and accompanying text infra.

177, 190; *accord Robesky v. Quantas Empire Airways, Ltd.*, 573 F.2d 1082, 1088 (9th Cir. 1978).

Although "to process a [meritorious employee grievance] in a perfunctory fashion" may be arbitrary, *Vaca v. Sipes, supra*, 386 U.S. at 191, simple negligence by a union in processing such a grievance does not constitute a breach of the DFR, *Franklin v. S. Pac. Transp. Co.*, 593 F.2d 899, 901 (9th Cir. 1979); *Robesky v. Quantas Empire Airways, Ltd.*, 573 F.2d at 1089-90 & n.16. Negligent conduct constitutes arbitrary action in violation of the DFR only if (1) the conduct reflects "reckless disregard" for the well-being of the employee, (2) the employee is "severely prejudiced" by the conduct, and (3) DFR policy would not be served by shielding the union from liability. *Id.* at 1090. *See also Ness v. Safeway Stores, Inc.*, 598 F.2d 558, 560 (9th Cir. 1979).

The district court made the following factual findings:

> 1. Piedermann told Usiquiano that he had not quit his job, but was wrongfully discharged from it.
>
> 2. Before it began its inquiry, the Union received from Mission Valley a copy of a "Notice to Employee as to Change of Status" which clearly indicates that Piedermann did not quit, but had been fired.
>
> 3. Alcoser never interviewed Piedermann, and never found out Piedermann's version of the events from him or anyone else; he spoke only to the superintendent of Piedermann's worksite, his immediate supervisor, and several co-workers.

These findings are supported by the record.[2] The only evidence that Piedermann quit his job consists of a statement he made

[2] Additionally, there is evidence that Alcoser did not know of the Notice to Employee that was sent to the Union, and that criminal actions pending against Usiquiano and other union officials caused "sloppy and inattentive" processing of grievances.

after having been reprimanded for failing to follow instructions,[3] and his failure to dispute the Union's conclusion that he quit when told of it in a meeting with Usiquiano. The Union's failure to even attempt to obtain Piedermann's version of the facts and to take note of significant evidence in its possession that was favorable to his case shows that its inquiry was undertaken in reckless disregard of Piedermann's well-being.[4]

The district court further found that Piedermann would have been rehired if the Union had pursued his grievance. This finding is also supported by the record. There was evidence that Piedermann was eligible for rehire at Mission Valley, and that other discharged employees had been reinstated after minimal efforts on their behalf by the Union. Usiquiano himself testified that Piedermann might have been reinstated if the grievance had gone to arbitration. Because the manner in which the Union investigated Piedermann's grievance cost him the opportunity to be reinstated, we conclude that he was severely prejudiced by the Union's actions.

The policy factor is a close question. Unions have wide discretion regarding the screening of grievances and the allocation of group resources, *e.g.*, money, bargaining power, and interests of other workers. *Robesky v. Quantas Empire Airways, Ltd., supra,* 573 F.2d at 1097; *see Ness v. Safeway Stores, Inc., supra,* 598 F.2d at 560. Piedermann's complaint was arguably without merit, because the district court found that he was discharged for legally sufficient cause under the agreement. Thus, failure to shield the Union from liability in this case might be said to defeat the policy of allowing unions to screen grievances. However, Piedermann's grievance was meritless

[3] "I have no job here; give me my check." The fact that Piedermann reported for work the morning after having said this suggests that, whatever he meant by it, he did not intend to quit his job.

[4] The Union contends that the district judge specifically concluded that the Union did not proceed in reckless disregard of Piedermann's rights. This conclusion does not appear in the district court opinion.

because he was fired for cause, and not, as the Union erroneously concluded, because he voluntarily left his job. In circumstances such as these failing to shield the Union might actually promote policies underlying the DFR, by penalizing unions that do not thoroughly investigate all grievances and that decline to pursue a grievance when it is not at all clear that the grievance is truly lacking in substance. The mistake of the Union in this case was not a "mere error in judgment," as the Union implies; it involved a significant and highly prejudicial factual error which was easily discoverable upon reasonable investigation.

In the face of substantial evidence supporting each *Robesky* factor, the Union details the extent of its investigation in an attempt to show that the district court's finding of arbitrariness is clearly erroneous. It does not matter that the Union's investigation might be described in the abstract as meticulous; what matters is whether the investigation was conducted meticulously enough to meet the standard of care imposed on the Union under the DFR. It clearly was not.

We conclude that the Union's conduct in investigating Piedermann's grievance was so negligent that its subsequent decision not to pursue that grievance must be classed as arbitrary. Therefore, we affirm the judgment of the district court that the Union breached its DFR as to Piedermann. Having affirmed the judgment on this ground, we find it unnecessary to decide whether the Union was guilty of unfair discrimination as well.

The Union further argues that, even if it breached its DFR, Piedermann should not have been awarded compensation for loss of his job, but only for the cost of the arbitration hearing that the Union should have provided him. This argument is without merit. The district court found on substantial evidence that Piedermann would have been reinstated had the Union fulfilled its duty to him. In other words, the Union's breach of

its duty cost Piedermann his job. Thus, it was proper for the district court to award Piedermann compensation for the loss of his job.

II

Piedermann cross-appeals from the district court's denial of his claim for future damages. His Notice of Appeal, however, was not timely filed.[5] Timely filing of a notice of appeal is mandatory and jurisdictional. *Whittaker v. Whittker Corp.*, Nos. 77-2297, 77-2550, slip op. at 362, 366 (9th Cir. Feb. 12, 1981); *Wallace v. Chappell*, No. 79-3172, slip op. at 202, 203 (9th Cir. Feb. 2, 1981) (en banc). Thus, we have no choice but to dismiss Piedermann's cross-appeal for lack of jurisdiction.

The judgment of the district court is AFFIRMED.

---

[5] Under Fed. R. App. P. 4(a), the deadline for filing the cross-appeal was the later of thirty days following the district court's entry of judgment on August 23, 1979, or fourteen days following the Union's filing of its Notice of Appeal on August 29, 1979. Under Fed. R. App. P. 26(a), this deadline works out as September 24, 1979. The notice was not filed until September 25.

Opposition

Office - Supreme Court, U.S.
FILED
NOV 12 1981
ALEXANDER L. STEVAS
CLERK

No. 81-315

IN THE
Supreme Court of the United States

October Term, 1981

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL NO. 89, AFL-CIO,

Petitioner,

vs.

EDUARDO PIDERMANN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

GEORGE JOHN MURFEY, ESQ.
MURFEY, HILL & DuVAL
8950 Villa La Jolla Drive
Suite 2222
La Jolla, California 92037
Telephone: (714) 455-7654

Counsel of Record for
Respondent

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

QUESTION PRESENTED FOR REVIEW

Was the judgment of the Circuit Court consistent with decisions of this Court when it affirmed a judgment holding the petitioner Union liable for damages for loss of employment, where:

1. That Union breached its duty of fair representation in failing to process the respondent employee's grievance for wrongful discharge; and

2. The trial court specifically found that had the Union processed the grievance, the respondent would have been reinstated notwithstanding the fact that he was discharged for cause in accordance with the applicable Collective Bargaining Agreement?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	6
APPENDIX A: District Court for the Southern District of California's Findings of Fact and Conclusions of Law	A-1

TABLE OF AUTHORITIES

Page

CASES

Czosek v. O'Mara,
397 U.S. 25 (1970) 4,6

Del Casal v. Eastern Airlines, Inc.,
634 F.2d 295 (5th Cir. 1981) 4

International Brotherhood of Electrical Workers, et al. v. Foust, 422 U.S. 42 (1979) 5

Kaiser v. Local No. 83,
577 F.2d 642 (9th Cir. 1978) 5

Self v. Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 61, 620 F.2d 434
(4th Cir. 1980) 4,5

Steele v. Louisville & Nashville R. Co.,
323 U.S. 192 (1944) 5

Vaca v. Sipes,
386 U.S. 171 (1967) 4,5,6

STATUTES

28 U.S.C. 1254(1) 2

No. _____

IN THE

Supreme Court of the United States

October Term, 1981

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL NO. 89, AFL-CIO,

Petitioner,

vs.

EDUARDO PIDERMANN,

Respondent.

BRIEF IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The respondent, Eduardo Pidermann (Pidermann), respectfully submits this Brief in Opposition to Petitioner's Request that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 20, 1981.

OPINIONS BELOW

While no written opinion was tendered by the District Court for the Southern District of California, its Findings of Fact and Conclusions of Law appear in the Appendix hereto at A. 1-6. The Opinion of the Court of Appeals appears in the Appendix to the Petition For a Writ of Certiorari. A Petition For Rehearing and Suggestion For Rehearing En Banc was denied on June 10, 1981.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Eduardo Pidermann (Pidermann), plaintiff in the trial court and respondent herein, was born in Cuba. He immigrated to the United States in 1962 and in that same year became employed at the Mission Valley Brick Company, Inc. (Company). As an employee of the Company, Pidermann became a member of the Laborers' International Union of North America, Local No. 89, AFL-CIO (Union). During his employment at the Company, Pidermann was a member of good standing in the Union.

In November of 1975, Pidermann was discharged by the Company after thirteen and one-half years of employment. Due to his inability to speak English with any fluency, Pidermann was in no position to seek reinstatement on his own behalf. He contacted Union officials for the purpose of filing a grievance over his termination by the Company.

The Collective Bargaining Agreement between the Union and the Company, which covered Pidermann's employment, provided that employees could only be terminated for sufficient cause. It also provided a grievance procedure whereby the Union could request an arbitration to

resolve disputes concerning the agreement. The Union did not seek an arbitration of Pidermann's grievance that he had been discharged by the Company without just cause.

Pidermann filed a complaint against the Union for breach of its duty of fair representation and against the Company for breach of the Collective Bargaining Agreement. He sought damages for the wages and benefits he lost as a result of his termination. The trial court found that the Union breached its duty of fair representation by arbitrarily and discriminatorily failing to investigate and process Pidermann's grievance. The trial court found that the Company did not breach the Collective Bargaining Agreement in that Pidermann was discharged for just cause.

Significantly, however, the trial court specifically found that Pidermann would have been reinstated had the Union fulfilled its duty of fair representation. It therefore awarded Pidermann damages against the Union in the amount of $53,893.00 as compensation for his l[illegible] of employment up until the date of judgment. Although the trial court also found that Pidermann's age (58), his limited employment skills, and his inability to speak adequate English militated against his obtaining further employment, the court failed to award Pidermann future damages. These findings were upheld on appeal to the Ninth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

The decision below was in accordance with the body of law that allows a discharged employee to recover those damages attributable to the Union's breach of its duty of fair representation, notwithstanding the fact that the employer was found not to have breached the applicable Collective Bargaining Agreement.

ARGUMENT

Petitioner seeks to have this case reviewed because the court below failed to allocate damages between the Union and the employer in accordance with the damage caused by the fault of each. Respondent submits that given the factual situation of this case, the courts below clearly awarded damages according to the fault of the parties.

Any discussion must begin with the somewhat unique factual situation of this case. Unlike many of the cases cited by the petitioner, the subject case is not one where the employer has been found to have breached the applicable Collective Bargaining Agreement while the Union breached its duty of fair representation. The respondent, Pidermann, was found to have been discharged for cause and therefore, not in contravention of the Collective Bargaining Agreement. But the court did find that the Union breached its duty of fair representation in not investigating and pursuing Pidermann's grievance for a wrongful discharge. In the typical context, even if the Union had processed his grievance, Pidermann would not have been reinstated in that he was discharged for cause. The Union would then only be responsible for the damages incurred by Pidermann which flowed from or occurred directly as a result of the Union's failure to properly pursue his grievance, *Vaca v. Sipes*, 386 U.S. 171, 197-198 (1967), *Czosek v. O'Mara*, 397 U.S. 25, 29 (1970), *Self v. Drivers, Chauffeurs, Warehousemen, and Helpers Local Union No. 61*, 620 F.2d 434, 444 (4th Cir. 1980). In the typical situation, the employee's damages would be his expenses, including attorneys' fees and costs, that the employee incurred in seeking a fair resolution of his claim. Such an award is proper even if the employee did not prevail in his claim against the employer, *Del Casal v. Eastern Airlines, Inc.*, 634 F.2d 295, 301-302 (5th Cir. 1981).

However, the trial court specifically found that notwithstanding the discharge for cause, Pidermann would have been reinstated had the Union processed his grievance. The importance of this finding cannot be

over emphasized. It means that the Union's arbitrary and discriminatory actions did more than deny Pidermann his right to arbitration and did more than cause Pidermann to resort to the District Court to correct the Union's abuses. Those actions directly resulted in Pidermann not being reinstated to his former position. In light of the holding of *Vaca v. Sipes, supra*, and taking the decision in *Self v. Drivers, Chauffeurs, Warehousemen, and Helpers Local Union No. 61, supra*, to its logical extension under the subject factual situation, damages for loss of employment are proper in that they are directly attributable to the Union's wrongful conduct.

Though the petitioner would have us believe otherwise, the holding in *Vaca v. Sipes, supra*, and other cases commands no other result. The right to bring unfair representation actions is judicially "implied from the statute and the policy which it has adopted." *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 204 (1944). The doctrine serves as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes, supra*, at 182. Even though the employee may be precluded from obtaining any damages against his employer, he may still recover against his union for refusing in bad faith to file grievance procedures on his behalf. *Kaiser v. Local No. 83*, 577 F.2d 642, 645 (9th Cir. 1978).

In *International Brotherhood of Electrical Workers, et al. v. Foust*, 422 U.S. 42 (1979) at 46-47, the Court stated:

> "The fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of employees' rights. In approving 'resort to the *usual* judicial remedies of injunction and award of damages when appropriate,' *Steele v. Louisville & Nashville R. Co.*, 323 U.S. at 207 (emphasis added), the Court emphasized that relief in each case should be fashioned to make the injured employee whole." *Id.* at 206-207.

Thus, "The appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach." *Vaca v. Sipes, supra*, at 195. The only apparent limitation in making the injured employee whole is that the compensatory damages must be those attributable to the fault of the Union. *Id.* at 197. This is precisely what the Courts below have done, in that it was the Union's wrongful conduct that prevented Pidermann's reinstatement.

The petitioner's reliance on apportionment is misplaced. Apportionment of damages is used in employee discharge cases when the Union is found to have breached its duty of fair representation after the employer had breached the applicable Collective Bargaining Agreement, *Vaca v. Sipes, Id., Czosek v. O'Mara, supra*. The employer's breach is not present in the case at hand.

Still, in factual situations similar to *Vaca v. Sipes, supra*, apportionment serves as a device to ensure that the Union is held liable for only those damages attributable to its conduct. Petitioner propounds to give a new definition to that rule. By requesting this Court to reverse the Circuit Court's decision, it seeks to limit the Union's liability even when the damages are directly attributable to the Union's wrongful conduct. The petitioner is seeking an immunity from damages for loss of employment. To grant such an immunity would be to deprive the discharged employee of his well settled right to be made whole, thereby seriously impairing the effect of fair representation suits.

CONCLUSION

In that the employer herein was found not to have breached the Collective Bargaining Agreement, there was no fault on its part. To award damages against the employer would be to charge it with a contractual violation on the basis of conduct precisely in accord with the requirements of the Collective Bargaining Agreement. However, the Union was found to have breached its duty of fair representation.

Furthermore, there was a specific finding of fact that this breach prevented Pidermann from being reinstated, notwithstanding that he was discharged for cause. Accordingly, the Union was held liable for the damage resulting from its fault - the respondent's loss of employment - and Pidermann was made whole in accord with well settled legal precedent.

Petitioner is under the mistaken impression that the Union's misconduct damaged Pidermann only to the extent that he was denied his chance to arbitrate his grievance and had to resort to the District Court. This position would be tenable had there not been the specific finding of fact that but for the Union's misconduct, Pidermann would have been reinstated. The petitioner's argument is therefore not persuasive. In that the Union was solely at fault, and that its misconduct denied Pidermann his reinstatement, the Courts below made Pidermann whole by properly awarding him damages for his loss of employment. This judgment and decision is consistent with the authorities cited herein.

It is therefore respectfully submitted that the petitioner has wholly failed to sustain its burden of establishing under Rule 19 that there are special reasons why the Writ should be granted. The Court of Appeals did not decide a Federal Question in a way which conflicts with applicable decisions of this Court or of another Court of Appeals on the same matter. The Writ of Certiorari should be denied and the judgment and opinion of the Court below should stand.

DATED: November 11, 1981

Respectfully submitted,

MURFEY, HILL & DuVAL

By: _____
GEORGE JOHN MURFEY, ESQ.

Counsel of Record for Respondent

APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EDUARDO PIDERMANN, Plaintiff, v. MISSION VALLEY BRICK COMPANY, INC., and LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NUMBER 89, Defendants.	Case No. 76-1085-S **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This action came on trial before the court, Honorable Edward J. Schwartz, Judge Presiding, plaintiff being represented by George John Murfey, Henry and Murfey, and defendant, MISSION VALLEY BRICK COMPANY, INC., being represented by James K. Smith, Gray, Cary, Ames and Frye, and defendant, LOCAL NUMBER 89, represented by Thomas B. Manning.

The court now makes the following findings of fact and conclusions of law in determination of all issues material to the judgment in this case:

FINDINGS OF FACT

1. MISSION VALLEY BRICK COMPANY, INC. (hereinafter referred to as Employer) is a corporation incorporated under the laws of the state of California.

2. LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NUMBER 89 (hereinafter referred to as Union) is a labor organization as defined in the National Labor Relations Act, as amended.

3. Plaintiff first became a member of the Union in May, 1962, and was a member in good standing at all times relevant to this lawsuit.

4. At all times relevant to this lawsuit, all party litigants were governed by the terms of a collective bargaining agreement between the Employer and Union providing, *inter alia*, that the Union was the sole and exclusive bargaining representative for the employees of Employer.

5. On Thursday, November 27, 1975, plaintiff was working at the brickyard as a full-time employee of Employer.

6. Approximately at noon on November 27, 1975, plaintiff was instructed over the telephone by the yard foreman to cover all of the bricks in the yard to protect them from possible rain damage.

7. Plaintiff failed to cover the bricks as instructed and, as a result, the bricks were damaged by the rain.

8. On Friday, November 28, 1975, plaintiff returned to work, at which time he was discharged by Employer.

9. Plaintiff was discharged by Employer for legally sufficient cause due to his failure to cover the bricks as ordered.

10. At the date of his discharge, plaintiff had been employed by Employer for a total of thirteen and one-half years.

11. In the first part of December, 1975, plaintiff communicated to Phillip Usquiano, Business Manager of the Union, a grievance with respect to the termination of his employment.

12. Phillip Usquiano was responsible for investigating grievances and allegations of wrongful Employer conduct made by Union members.

13. Plaintiff communicated to Usquiano his opinion that he had not quit his job, but rather, had been wrongfully discharged from his job by Employer.

14. By reason of plaintiff's inability to speak English with any fluency, he was in no position to seek reinstatement on his own initiative and was entirely dependent on the Union's efforts on his behalf.

15. Prior to investigating plaintiff's grievance, the Union had possession of Employer's document entitled "Notice to Employee as to Change of Status" reciting that plaintiff had been discharged.

16. Upon receiving plaintiff's complaint of wrongful discharge, Usquiano directed Joseph Alcoser, a business agent of the Union, to conduct an investigation into plaintiff's complaint.

17. At no time before or during his investigation of plaintiff's grievance did Alcoser contact or interview plaintiff and he admittedly did not know plaintiff's version of the events surrounding the discharge.

18. The extent of Alcoser's investigation was to speak with Richard Feltman, Superintendent of the brickyard, whereupon he concluded, contrary to the Notice to Employee as to Change of Status, that plaintiff had not been discharged but had quit voluntarily.

19. Alcoser made no attempt to verify with plaintiff whether he did in fact quit voluntarily and made a report to Usquiano concluding that he had quit.

20. Although Usquiano visited the brickyard after receiving Alcoser's report concerning the discharge, his testimony reveals that he never developed a familiarity with the facts pertaining to plaintiff's employment or his discharge.

21. Although Usquiano believed that plaintiff might have regained his job through arbitration, the Union did not pursue arbitration.

22. Despite plaintiff's repeated attempts during December, 1975, and January, 1976, to meet with Usquiano concerning the progress of the investigation, plaintiff was told repeatedly that Usquiano was not available to meet with him.

23. Contrary to the conclusion of the Union, plaintiff was discharged by Employer and did not terminate his employment voluntarily.

24. The history of the labor relations between Employer and Union reveals a pattern of employee discharge followed by reinstatement with very little effort by the Union.

25. Plaintiff would have been reinstated if the Union had diligently supported and assisted him.

26. Plaintiff has sought employment since November 28, 1975, in a diligent attempt to mitigate his damages; however, his age, the limited nature of his employment skills and his inability to speak adequate English all militated against his obtaining further employment.

CONCLUSIONS OF LAW

1. Plaintiff's discharge by Employer on November 28, 1975 was not a violation of the collective bargaining agreement as it was for legally sufficient cause.

2. Plaintiff was discharged and did not terminate his employment voluntarily.

3. In view of plaintiff's timely request to the Union to pursue his grievance, the Union owed plaintiff a duty of fair representation.

4. The Union owed plaintiff a duty to investigate his grievance, to process his grievance vigorously, and to seek and secure his reinstatement with Employer.

5. The Union breached its duty of fair representation to plaintiff because its investigation into the circumstances of the discharge was so perfunctory as to make its decision not to pursue the grievance an arbitrary one.

6. The Union's representation of plaintiff was discriminatory in that it had previously, with very little effort, won reinstatement for other employees discharged by Employer, but, in plaintiff's case, made no effort to seek reinstatement despite Usquiano's belief that plaintiff might have regained his job had arbitration been undertaken.

7. Plaintiff's right of recovery against the Union for breach of its duty is not foreclosed by the fact that plaintiff was discharged by Employer for cause. *Kaiser v. Local No. 83*, 577 F.2d 642, 644-645 (9th Cir. 1978).

8. For the purpose of awarding damages, the court adopts the view that a breach of the duty of fair representation gives rise to liability partaking of the nature of a tort. *See Price v. Southern Pacific Transportation Company*, 586 F.2d 750, 752-753 (9th Cir. 1978).

9. Plaintiff has sustained substantial pecuniary damages as a proximate result of the Union's failure to provide him fair representation.

10. Fixing damages on a proximate cause basis reasonably within the limits of the evidence, the court concludes that plaintiff has incurred $53,893 in damages.

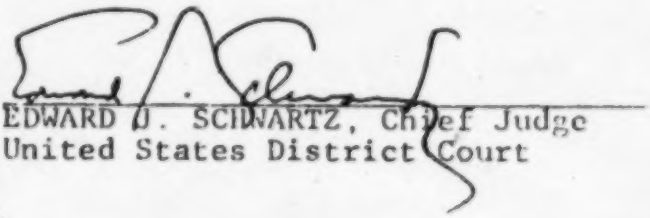
11. Plaintiff diligently mitigated his damages.

12. Employer is entitled to judgment against plaintiff, each to bear his own costs.

13. Plaintiff is entitled to judgment against the Union in the total sum of $53,893.00, together with his costs in this action.

The foregoing shall constitute findings of fact and conclusions of law as required by Rule 52, Federal Rules of Civil Procedure, and, wherever appropriate, the findings of fact shall be deemed conclusions of law, and the conclusions of law shall be deemed findings of fact.

DATED: August 22, 1979.



EDWARD D. SCHWARTZ, Chief Judge
United States District Court

Copies to all parties.